No. 12,961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD; RECONSTRUCTION FINANCE CORPORATION, as Assignee of Treasure Company,

Appellees.

UNITED STATES OF AMERICA for the Use of RECONSTRUCTION FINANCE CORPORATION, a Federal Corporation, Acting in Behalf of DEFENSE PLANT CORPORATION, a Federal Corporation,

Appellant,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE, HARRY WYNN, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

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Appellees.

(Continued on Inside Cover.)

Petition for Rehearing by Herschel Bullen, Mary N. Bullen, J. C. Hayward and Mary S. Hayward.

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THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN,

Appellants,

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Petition for Rehearing by Herschel Bullen, Mary N. Bullen, J. C. Hayward and Mary S. Hayward.

Introductory Statement.

In view of the fact that this litigation, under the decision on the appeal rendered by this Honorable Court, will continue in other cases, that is to say, the accounting suits now pending between the parties, and also in view of the fact that the case involves many complex problems of fact and of law, it is of the greatest importance to the litigants that adequate guidance be furnished to the courts who will decide the accounting suits. This Petition for Rehearing is filed primarily for the purpose of asking that the Opinion be amplified to cover certain specific points in relation to the rights of the appellants Bullen and Hayward, and particularly that it state that certain points have *not* been decided, and are therefore still open for decision by the court or courts who will decide the accounting suits, if it becomes necessary to bring such suits to trial. The giving of such further instructions in the nature of declaratory relief might well result in a settlement of the case, but, in any event, it would expedite such continued litigation as there may be.

The following are the points upon which these petitioners, the appellants Bullen and Hayward, request a ruling:

(1) Does the Court's statement that the two for one agreement is a personal covenant of Walter B. Scoville preclude the specific enforcement of that covenant against any share of the funds which another court, in an accounting suit, ultimately awards to said Walter B. Scoville?

(2) Does the Court's reference to pending litigation include any pending accounting suits between the parties, whether specifically referred to in the opinion or not, so that the funds will be retained pending the disposition of all such suits?

(3) Was the finding of the trial court that the two for one agreement was not binding upon Adamant Company or Treasure Company necessary for the decision of this case, so that it is now *res judicata,* or is that point also left open for subsequent adjudication in the accounting suits between the parties?

(4) Does the affirmance of the judgment as to Reconstruction Finance Corporation mean that the share of the award which was allocated to it by the trial court is not subject to diminution by virtue of any decision which might be rendered against its predecessor, Treasure Company, in the accounting suits?

(5) In addition to the foregoing, these petitioners request a rehearing on the question of the interpretation of the participating royalty assignments, that is to say, the percentage of production covered by such assignments, and that the decision of this point be also left to the accounting suits, where the court can take evidence of the actual interpretation which the parties have put upon the royalty agreements, in the allocation of income and expense.

I.

Does the Court's Statement That the Two for One Agreement Is a Personal Covenant of Walter B. Scoville Preclude the Specific Enforcement of That Covenant Against Any Share of the Funds Which Another Court, in an Accounting Suit, Ultimately Awards to Said Walter B. Scoville?

The statement of the Court (p. 13 of the opinion) that the two for one agreement was a personal covenant on the part of Scoville, and gave the Bullens and Haywards no interest in the well, or production from it, might well lead a court, in an accounting suit, to the conclusion that the Bullens and Haywards are not entitled to specific performance of this covenant on the part of Scoville. If so, the court might well conclude that they are no more than ordinary creditors of Scoville, and not entitled to come into the accounting suit and have Scoville's share of the award applied to the satisfaction of the two for one agreement.

As we understand the theory adopted by the Court in its opinion in this case, the holder of a participating royalty occupies a position in the nature of a stockholder in a corporation. He is something more than a stockholder, because a stockholder, of course, has no ownership of assets owned by the corporation, whether real or personal, *Eisner v. McAmber,* 252 U. S. 189 at 208, whereas the California cases now definitely establish that a royalty holder has an interest in real property. Cases cited on page 7 of the opinion.) On the other hand, the rights of a royalty holder, as this court has held, *In re Lathrap,*

61 F. 2d 37, are subject to payment of creditors of the enterprise, so that as a practical matter, upon a liquidation of the venture, the royalty holder stands in a similar position to that of a shareholder.[1]

The condemnation of the property in this case by the government resulted in an enforced liquidation of the enterprise. The property in which the participating royalty holders had an interest is gone, and cannot be followed by them. The money award stands in place of the property, and the situation is analogous to that in which a corporation, partnership, or other business enterprise, has been dissolved, and its assets reduced to cash and made available for distribution to the owners of the business, subject to the satisfaction of the creditors of such business.

The Court has held in this case that, since participating royalty holders, notwithstanding their property interest, have no direct estate or divisible interest, the court wherein the condemnation is accomplished is not required to conduct the winding-up proceedings, and should not do so, at least where there are accounting suits pending in other courts in which the same object can be accomplished. The Court further held, as we understand it, that the money resulting from the forced sale of the assets, and therefore available for distribution to the creditors and the royalty holders in the proper proportions eventually determined in the accounting suits, will be held intact pending the disposition of such suits by settlement or adjudication.

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[1]Some of the discussion in the *Lathrap* case as to the nature of an oil royalty would no longer be apropos, in view of subsequent developments in the California law, but, so far as we know, the decision that royalty holders are investors who are deferred to the ordinary creditors of he venture has not been questioned.

The question then arises as to whether these petitioners, in such an accounting suit, will be entitled to an adjudication that Scoville's obligation under the two for one agreement shall be satisfied out of the share of the award to which he would otherwise be entitled or whether the petitioners must stand aside so far as the two for one agreement is concerned, and then attempt to collect from him on a parity with his other creditors.[2]

Scoville, who made the two for one agreement with the petitioners Bullen and Hayward, was the holder only of a participating royalty interest. He could not give the petitioners any greater interest than he had, but he could, and we submit did, subject whatever interest he did have to the satisfaction of the obligation to the petitioners under the two for one agreement.

It must be borne in mind in this connection that, limited though they were, the rights which Scoville had as a participating royalty holder were an interest in *real property.* (Page 7 of the opinion in this case.) Courts of equity, from time immemorial, have specifically enforced covenants to give an interest in real property, whether the interest to be given is one of ownership or by way of security, and the covenantee, under the theory of equitable conversion, is deemed to have an interest in the property, in equity, from the time the agreement is made. Indeed, this theory of equitable conversion was one of the considerations which led the Supreme Court of California to the conclusion that a participating royalty holder has some sort of property interest in the real property

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[2]By other creditors, we mean creditors who did not advance money to this enterprise. Under the rule of *In re Lathrap,* creditors who advanced money for the drilling or operation of the well would be paid before Scoville's share was determined.

held by the lessee who issues the royalty. (*Schiffman v. Richfield Oil Co.* (1937), 8 Cal. 211, 64 P. 2d 1081.) The court there said, at the bottom of page 227 and the top of page 228 of the report in 8 Cal. 2d:

> "The equitable doctrine of specific performance and equitable conversion as applied to contracts to buy and sell land, arose from the inadequacy of the remedy of damages due to the unique character of the subject-matter of the contract. In the case of royalty assignments the uncertainty in amount and value of the oil to be produced renders the subject of the contract unique."

If Scoville had been the owner of the leasehold, there could be no question that his agreement to pay the Bullens and Haywards the sum of $10,000.00 out of 15% of the gross production from the well would have given the Bullens and Haywards a legal property interest under the law of California. The case of *Recovery Oil Co. v. Van Acker* (1947), 79 Cal. App. 2d 639, 180 P. 2d 436, and the same case after retrial (1950), 96 Cal. App. 2d 909, 216 P. 2d 483 (hearing denied by Supreme Court), explicitly so held.

The instrument involved in the *Van Acker* case assigned

> "the proceeds from 15% of the oil, gas and other hydrocarbon substances produced and sold from the said premises until such time as said assignee shall have received the sum of $20,000.00."

The two for one agreement in our case provides:

> ". . . these funds, $5,000.00, to be included in the said necessary funds, to be repaid two for one *out of production* . . ., it being understood and agreed that the said two for one *out of production* is to be repaid *out of* the first 15% of gross production from the said well." (Italics ours.)

[Pages 16 and 17 of the Opening Brief of these petitioners. The letter agreement itself is Exhibit 1 of these petitioners, and a printed copy is contained in the Record, Volume I, at pages 118-120.]

Does the fact that Scoville did not own the leasehold, but merely a participating royalty interest, prevent a court of equity from applying to the satisfaction of his obligation such interest as he had? The stating of the question, we submit, supplies the answer. No authority is needed for the proposition that a person who agrees to grant more than he owns will nevertheless be held to the obligation to grant what he has. It may be noted, however, that the principle has been applied in a case dealing with oil royalties. (*Schiffman v. Richfield Oil Co.* (1937), 8 Cal. 2d 211, 64 P. 2d 1081.) In this case, there were three trustees of a common law, or Massachusetts, trust, known as Monrovia Oil Company, which acquired a certain oil and gas sublease and drilled a well thereon. To finance the drilling of the well, the trustees issued participating oil agreements entitling the holders to stated percentages of the net proceeds from the sale of oil and gas produced from the well. All of the production remaining in the lessees after payment of landowner's royalty was disposed of in this manner. In other words, Monrovia Oil Company, the sublessee, which functioned through its three trustees, had nothing left but the bare legal title to the lease.

The trustees sold or purported to sell the leasehold estate to Brownmoor Oil Company, which in turn, and as part of the same transaction, sold it to Richfield Oil Company. The sale purported to be free and clear of any outstanding interests. The consideration paid by the purchaser was pocketed by the trustees.

The plaintiff Schiffman, one of the participating royalty holders, brought suit against Richfield, contending that Richfield had notice of his rights when it purchased, and that he was entitled to his share of the oil produced by Richfield, such share being that called for by his participating royalty. The trial court and the Supreme Court agreed with this contention, and the question arose as to whether Richfield got any share of the oil at all, in view of the fact that 100% of production was outstanding in the hands of landowners and participating royalty holders. It happened, however, that one of the trustees who participated in the sale of the property to Brownmoor, and then to Richfield, was himself the owner of certain units of the participating royalty, and the court held that Richfield would acquire this interest. This appears at page 221 of the report in 8 Cal. 2d. The court says near the bottom of page 221 and at the top of page 222:

> "However, it would seem that the defendant company may have the right to a part of the oil produced by it under the sublease. There can be no doubt that the transfers to the Brownmoor Company and to the defendant Richfield Company were plainly worded to transfer the sublease free of any interest in plaintiff and others in the proceeds of oil to be produced, and if it had been within the power of the transferors they would have had that effect. R. L. Casner, one of the trustees and president of the Monrovia Oil Company, participated in the attempted assignments to the Brownmoor Company free and clear of any claims of plaintiff and others, and that company transferred its interest to the Richfield Company. Casner held 800 of the 2,000 oil units issued by Mon-

rovia Oil Company. In the circumstances shown he would be estopped to claim that such rights as he had at the time of the transfer to the Brownmoor Company did not pass to it and from it to the Richfield Company."

Thus we have a clear holding by the Supreme Court of California, if any authority were necessary, that a person who purports to pass an interest in an oil lease, or in the proceeds of oil to be produced therefrom, which he does not own, will nevertheless be held to have transferred the part that he does own, even though the instrument of transfer makes no mention of it.

We have that precise situation in the case at bar. Under the holding of the trial court, as approved by this court, Scoville, in his capacity as the holder of a participating royalty, had no right or power to transfer to the petitioners Bullen and Hayward a gross royalty of the kind adjudicated in *Recovery Oil Co. v. Van Acker, supra.* He did attempt to do that very thing, however, and since he owned a 17% participating royalty (19% less the 2% which he assigned to these petitioners) [R. 142 and 145], these petitioners should get that participating royalty interest to the extent necessary to satisfy the two for one obligation; and, since the property is gone, this right should attach to Scoville's interest in the fund which takes its place.

The opinion of the Court as it stands, in the discussion on page 13, and particularly in the quotation from *Helvering v. O'Donnell,* may be such, however, as to lead a

trial court in an accounting suit to conclude that not only was the obligation created by the two for one agreement the personal obligation of Scoville but also that it created no specifically enforceable equity as against the property interest which Scoville owned. While this may be a matter of language, we submit that it should be cleared up.

Helvering v. O'Donnell (p. 13 of the Opinion), did not deal with the rights of the parties to the contract *inter se*. It involved the question of whether an interest had been created "in the oil and gas in place," so that the holder of the agreement would be entitled to a depletion allowance on the income therefrom. This is a technical question of tax law which should not control the rights of the parties as between themselves in equity. It might be noted further that in *Helvering v. O'Donnell,* the company which made the agreement in relation to the payment of the profits from the property did not then own the property, or any interest therein. In our case, Scoville did own an interest, to wit, a participating royalty, at the time he made the agreement.

In any event, we submit that if the Supreme Court of the United States, in *Helvering v. O'Donnell,* had been deciding whether O'Donnell had a specifically enforceable right to his share of earnings as against the company which made the agreement or its privies, he would have prevailed, and, whether it would have so held or not, the Supreme Court of California would certainly have done so, at least in the case of an agreement pertaining to

production from a certain lease or well. In all decisions by the Supreme Court of California, and all decisions by the District Court of Appeal of California in which the Supreme Court has denied a hearing, passing upon instruments which purport to give the holder a share of the oil from specific property, or a share, whether gross or net, of the proceeds of sale of such oil, where the question involved was whether or not the agreement was enforceable against the one who made it, and also against anyone taking title to the property with knowledge of the outstanding agreement, it has been held, *without exception,* that it was enforceable as against such persons. While the theory by which this result has been accomplished has been variously stated, the actual holdings have been uniform, and the cases extend over a period of seventeen years.

Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733 (1933);

Callahan v. Martin, 3 Cal. 2d 110 (1935);

Standard Oil Co. v. J. P. Mills Organization, 3 Cal. 2d 128 (1935);

Dabney-Johnston Oil Corporation v. Walden, 4 Cal. 2d 637 (1935);

Schiffman v. Richfield Oil Co., 8 Cal. 2d 211 (1937);

Austin v. Hallmark Oil Co., 21 Cal. 2d 718 (1943);

Gavina v. Smith, 25 Cal. 2d 501 (1944);

Recovery Oil Co. v. Van Acker, 96 Cal. App. 2d 909 (1950) (hearing denied by Supreme Court).

The fact that the agreement in our case will be satisfied when $10,000.00 has been paid does not change the situation. It simply means that the covenant we seek to specifically enforce as against the person who made it gives us something in the nature of a security interest. It is precisely the kind of agreement which was passed on by the California court in *Recovery Oil Co. v. Van Acker* (*supra*), and which was held in that case to be enforceable against a successor of the covenantor who was chargeable with knowledge of it. In the article on specific performance, 25 R. C. L., at page 288, the authors state:

> "An agreement to execute a mortgage upon real property may be enforced in equity if the complainant has performed his part of the agreement by furnishing the money for which such mortgage was agreed to be given. Equitable relief is granted because the complainant does not trust to the personal responsibility of the defendant, and to refuse relief would be to deprive him of the security upon which he relies."

In our case, the wording of the agreement that the money was to be paid "out of production" indicates that the petitioners did not look to the personal obligation of Scoville alone. In fact, his personal credit was not engaged. It was a personal covenant, but only in the sense that they looked to him to see to it that 15% of the production from the well was paid to the petitioners until they received the sum of $10,000.00.

In this connection, it should be observed that at the time the two for one agreement was made with the petitioners, which was in September of 1938 [Ex. 1 of petitioners Bullen and Hayward], the well was in the possession of a committee set up to operate it under the agreement of April 5, 1938, between the lessee, Treasure Company, on the one hand, and Scoville and his family company, the Adamant Company, on the other hand. [Treasure Company's Ex. QQ.] The well had not been brought in. It was the money of these petitioners which put it on production. [Finding XXIV, R. 145.] Casing was not set until after November 10, 1938. (*Scoville v. de Bretteville,* 50 Cal. App. 2d 622 at 626.) The event which deprived Scoville and the Adamant Company of any rights of management and limited their royalty interest to the first well, to wit, the bringing in of the first well for less than 200 barrels per day, had therefore, not yet occurred. Furthermore, Scoville represented to these petitioners that he was acting on behalf of the committee. [R. 1191.] If in fact he had no authority to commit 15% of gross production to payment of the $10,000.00, this is all the more reason for a court of equity to enforce the agreement against the interest he had.

Our belief that the Court did not intend to prevent these petitioners from reaching Scoville's share of the award, and that, although their rights are subject to prior rights of creditors of the enterprise, they are not on an equality with personal creditors of Scoville, is strengthened by the fact that the Court gave at least tacit approval to the recognition by the trial court of the doctrine of equit-

able conversion. At page 10 of the opinion, this Court refers to the fact that the trial Judge treated certain assignments which Treasure Company and also Scoville agreed to make to Wynn as having been actually made, though the agreements had not been completed by the execution of formal assignments.

In the last paragraph of the footnote on page 14 of the Opinion, the Court refers to that part of the agreement between Scoville and the petitioners wherein he agreed to assign to each a 1% participating royalty, and states "that this was likewise a personal undertaking to do something in the future." Scoville did in fact execute formal assignments of these two 1% interests [Finding XVII, R. 141], but we have no doubt that if he had not done so, the trial court, consistently with its holding in the case of Wynn, would have treated that as having been done which should have been done, and that this Court would have approved it.[3]

We earnestly request, therefore, that the opinion be modified or amplified to make it clear that the holding of the Court in regard to the so-called two for one agreement, while it is a holding that the agreement is a per-

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[3]The footnote on page 14 makes the correct statement that persons holding warrants or rights to subscribe to stock are not considered stockholders. However, the reason they are not is that they have only an option to acquire stock. If the option is exercised and the money is paid they are entitled to specific performance, assuming that there is authorized stock available. *Helvering v. Southwest Consolidated Corp.*, 315 U. S. 194, at 201 (*semble*).

sonal covenant of Scoville, and gives no rights in the leasehold, and no other rights of which the trial court was required to take cognizance in this proceeding, was not intended as a denial of any specifically enforceable rights in these petitioners as against Scoville or his privies. If that was not the Court's intention, we request a rehearing, since we believe that the Court should be reluctant to hold, contrary to every decision by the Supreme Court of California on the subject, that an agreement to pay over the proceeds of sale of a part of the production from an oil well is not specifically enforceable as against the promisor, and anyone claiming through him who is chargeable with knowledge of the agreement.

Any holding which would preclude these petitioners from an accounting against Scoville would constitute a grave injustice to them. They provided the money which made the venture successful, but instead of obtaining the shares for which they bargained and which Scoville, at least, agreed should be paid to them out of production, they might well end up with nothing from the two for one agreement, except a small dividend, if any, after payment of the administrative expenses of Scoville's bankruptcy. In fact, it would appear from the record that the $30,000.00 which was awarded to Scoville in this case will never become available for payment of his personal creditors. The record discloses [R. 96], that J. Orville Seeple claims that Scoville's participating royalties are held in trust for Seeple. This claim is apparently admitted by Scoville, since he and Seeple are represented by the same counsel.

II.

Does the Court's Reference to Pending Litigation Include Any Pending Accounting Suits Between the Parties, Whether Specifically Referred to in the Opinion or Not, so That the Funds Will Be Retained Pending the Disposition of All Such Suits?

This question is submitted because petitioners Bullen and Hayward do have an accounting suit pending in the State Superior Court for the County of Los Angeles against Scoville, Adamant Company and Treasure Company, and it may be important to continue that suit rather than to intervene in any other pending accounting suit, for the reason that a petition for intervention at this late date might be met by a plea of the statute of limitations.

It appears to us that the opinion of this Court is general in its reference to withholding the funds pending the outcome of accounting suits between the parties, but if the Court sees fit to modify or amplify its opinion in any other respect, it is hoped that some reference may be made to the pending State suit brought by these petitioners. The fact that such suit was brought is, we believe, in the record of this case although not in the printed portion thereof. The case is *Herschel Bullen, et al. v. Walter B. Scoville, et al.,* No. 447435, in the Superior Court of the State of California, in and for the County of Los Angeles.

III.

Was the Finding of the Trial Court That the Two for One Agreement Was Not Binding Upon Adamant Company or Treasure Company Necessary for the Decision of This Case, so That It Is Now Res Judicata, or Is That Point Also Left Open for Subsequent Adjudication in the Accounting Suits Between the Parties?

This point may become important to these petitioners, because, as noted above, J. Orville Seeple claims, and the claim is apparently admitted by Walter B. Scoville, that Scoville's participating royalties are held in trust for Seeple. [R. 96-97.] It is believed that any rights of Seeple are subject to those of petitioners (assuming that petitioners' rights are specifically enforceable in equity), but the claim indicates the need for putting the claim of the Bullens and Haywards upon as broad a base as possible.

All the testimony there is on the subject is to the effect that the original of the letter agreement was signed by the Adamant Company, as well as by Scoville. Mr. Bullen testified that Mr. Halverson, attorney for Scoville and the Adamant Company, had told him that the agreement was signed by the Adamant Company, by Helen Scoville, its secretary, and that is the reason he wrote down such a signature on his copy of the agreement. That testimony was as follows [R. 1218-1219]:

> "Q. Mr. Bullen, I am going to show you Plaintiff's Exhibit 1, this letter of September 27, 1938, and call your attention to the writing down there in the left-hand corner, the statement, 'We agree to the foregoing'; is that your handwriting? A. Yes, sir.

Q. And under that, 'the Adamant Company, by Helen Scoville, Secretary.' A. That is my writing.

Q. Over at the left, 'Adamant Company, Seal.' A. Yes, Adamant Company Seal over there.

Q. Will you explain how you happened to put that on there? A. That was because I understood from George Halverson that Adamant Company had signed by Helen Scoville, that it had been signed by her for the Adamant Company.

Q. Did you have a letter from Mr. Halverson to that effect? A. No, not a letter.

Q. He told you that, did he? A. Yes."

It will be recalled that the original of the letter agreement has been lost, and it is this copy of the agreement, bearing the actual signature of Scoville and the copied signature of the Adamant Company written down by Mr. Bullen, which is in evidence. [Ex. 1 of petitioners Bullen and Hayward.]

Mr. Halverson not only told Mr. Bullen that the letter agreement which provides for the two for one payment had been signed by the Adamant Company, but he also wrote a letter to Messrs. Young and Bullen, attorneys in Utah for Mr. Bullen and Dr. Hayward, in which he said:

> "We have also, under date of September 27, 1938, a letter addressed to us by Herschel Bullen and J. C. Hayward directing on what terms the checks were to be turned over to the Treasure Company, and we merely had the Adamant Company and Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter."

This letter to the petitioners' attorneys is dated March 25, 1939, and is in evidence in this case as Petitioners' Exhibit No. 9. Mr. Halverson testified [R. 1240] that

he was at that time representing the Adamant Company. We therefore have an admission and representation made by the attorney for the Adamant Company, at a time when steps could have been taken to obtain a proper signature if it had not been signed, and we submit that there is not only evidence that the agreement was signed by the Adamant Company *and no evidence to the contrary,* but also that the Adamant Company is estopped to deny that it signed the agreement, if in fact it did not do so.

Mr. Halverson also testified in this case that the original had such a signature. His testimony was [R. 1239]:

> "Q. Will you state whether or not you can testify that the signature of the Adamant Company by Helen Scoville, Secretary, was on the original of that? A. I can.
>
> Q. What is your answer to that? Was it, or was it not? A. It was on it.
>
> Mr. Hoge: That is all.
>
> The Witness: Of course, I didn't see her write it, but I know it was there.
>
> Q. (By Mr. Hoge): You saw the signature? A. It was produced by Mr. Walter B. Scoville."

It was stipulated that Mrs. Scoville had authority to sign for the company. This appears at pages 1223 and 1224 of the record, as follows:

> "Mr. Bodkin: I take it there is no controversy on the part of any of the folks represented by you that Mrs. Scoville was authorized to sign that agreement, that letter? When she signed on behalf of the Adamant Company, she was authorized to sign on behalf of Adamant Company?
>
> Mr. Allen: This last letter?

Mr. Bodkin: The original contract, which counsel claims was the contract, the letter to George Halverson.

Mr. Allen: Let's see what you are talking about.

Mr. Bodkin: Do you have the number of that?

Mr. Hoge: That is Plaintiff's Exhibit 1.

Mr. Allen: You mean that form letter? Yes, she was authorized to sign that.

Mr. Bodkin: I am referring now to Exhibit 1.

Mr. Allen: What is the date?

Mr. Hoge: September 27, 1938, I believe.

Mr. Bodkin: September 27, 1938, yes.

Mr. Allen: Yes, she was authorized to sign *when she did that.*" (Italics added.)

The italicized portion may indicate a stipulation that Mrs. Scoville did sign the original. It was so understood by Mr. Bodkin. At page 1240 of the record, he makes the following statement, without drawing any comment from Mr. Allen:

Mr. Bodkin: It was stipulated yesterday that was her signature and she was authorized to bind the company, according to my recollection."

Last, but not least, the Adamant Company stood silent and made no attempt to show that the agreement was not signed by it.

Under these circumstances, it seems clear to us that the finding of the trial court that Adamant Company was not a party to the agreement was an inadvertent error. The finding was assigned as error by these appellants. However, it also seems to us that the finding was not essential, since the trial court took the view, which has been

affirmed by this Court, that it was not required to adjudicate rights under the two for one agreement in this proceeding. Unless the point is cleared up, however, it is not unreasonable to suppose that the petitioners will be met by a plea of *res judicata* in the accounting suit when they attempt to broaden the coverage of the two for one agreement.

IV.

Does the Affirmance of the Judgment as to Reconstruction Finance Corporation Mean That the Share of the Award Which Was Allocated to It by the Trial Court Is Not Subject to Diminution by Virtue of Any Decision Which Might Be Rendered Against Its Predecessor, Treasure Company, in the Accounting Suits?

We understand the Court's position to be that since Treasure Company, the assignor of Reconstruction Finance Corporation, was the owner of the leaseholds, it had an estate, a severable interest, in the property. Its interest was subject to valuation and distribution in this proceeding, whereas the holders of participating royalties assigned to them by the lessee, not having such estates or divisible interests, did not have the right to require the Court, in the condemnation case, to determine and evaluate their interests.

The Court, although recognizing their interest in real property, puts the royalty holders in a position analogous to that of shareholders of a business enterprise upon a winding-up of the business. It must be borne in mind,

however, that Treasure Company was the operator of the enterprise, and had the legal title to the property involved therein. It was also a "shareholder" in the sense that it retained a part of the beneficial interest in the net profits. It would be only in this capacity that it could receive a part of the assets. Upon a judicial liquidation, the assets in custody of the court are a trust fund for the payment of creditors and shareholders. (15A Fletcher Cyclopedia of Corporations, Permanent Ed., 90, Sec. 7386.)

As the holder of the legal title and the one who had the sole right to conduct operations, Treasure Company sustained a fiduciary relation toward the royalty holders even before the liquidation. (*Differding v. Ballagh,* 121 Cal. App. 1, 8 P. 2d 201.) It will therefore be properly called upon in the accounting suit to account to the royalty holders for their share of the net proceeds of all oil and gas produced from the well to the date of the condemnation by the Government, and going back as far as the end of the period covered by any prior accounting suits. (In this connection, although the Vickers judgment did not become final until 1942, the judgment brought the accounting only up to November 27, 1940, which was the date Judge Vickers made his finding. [R. 136, Finding III].)

Reconstruction Finance Corporation in this case stands only as the successor of Treasure Company, and had no greater rights than it had. (See Appellant's Brief of the R. F. C., p. 5.) It is there stated,

> "Thus R. F. C. stands in the shoes of Treasure Company in this appeal and asserts no rights, as a dis-

tributee of the award, other than the rights of Treasure Company."

Under these circumstances, the affirmance of the judgment as to Reconstruction Finance Corporation, and particularly the fact that, as we read the judgment, the money awarded to that company is not to be kept intact pending the outcome of the accounting suits, would seem to result in an unfair discrimination in its favor. Reconstruction Finance Corporation is, of course, financially responsible, and if the judgment does not intend to preclude the diminution of its share by the amount of possible recoveries against its predecessor, Treasure Company, in the accounting suits, then the point may not be of practical importance, although we believe it should be cleared up. If we had a case in which the operators of the property were irresponsible or dishonest, or both, as in *Schiffman v. Richfield,* the implications would be startling. The lessee could take the money, or what appeared to be its share of it, and the royalty holders would have the right to get uncollectible judgments.

Even in this case the point is a practical one. The R. F. C. is not a party to the accounting suits. To collect from the R. F. C. any judgment rendered in those suits against Treasure Company, would require a new action. A multiplicity of suits may, therefore, result, if the share of the award which belonged to Treasure Company and was by it assigned to the R. F. C., is not held intact along with the rest of the money.

V.

In Addition to the Foregoing, These Petitioners Request a Rehearing on the Question of the Interpretation of the Participating Royalty Assignments, That Is to Say, the Percentage of Production Covered by Such Assignments, and That the Decision of This Point Be Also Left to the Accounting Suits, Where the Court Can Take Evidence of the Actual Interpretation Which the Parties Have Put Upon the Royalty Agreements, in the Allocation of Income and Expense.

In view of the fact that one or more accounting suits are to proceed, in which the evidence will show how Treasure Company accounted for expenses and profits, that is to say, what percentage of each it allocated to the outstanding participating royalties, it would seem logical to withhold the decision on this point also, so that the question of what percentage of production was assigned by the royalty assignments can be determined by the way in which the actual accounting was made by the assignor.

In regard to the bearing of the Vickers decision on this point, we believe that the effect of that case, *Scoville v. de Bretteville,* 50 Cal. App. 2d 622 (1942), was simply to eliminate any rights of possession or management given to Scoville or the Adamant Company by the agreement of April 5, 1938 [Treasure Company's Ex. QQ], and also, to limit their royalty interest to the one well. This decision was based upon the terms of the agreement, and resulted from the fact that the first well, Treasure Well No. 8, was completed for less than 200 barrels of oil per day. There was no reason to confine the participating royalty, thus limited, to only one of the two leaseholds which furnish the legal drill site for the well, or to change or limit the percentage of production which was

retained in the one well. Any language in the findings or the judgment of the *Vickers* case which, taken alone, might indicate such limitations, should be read in context and in the light of the agreement which the judgment construed.

However that may be, the *Vickers* case can, in any event, have no effect upon the rights which these petitioners have under their 2% participating royalty assignments, These petitioners were not parties to that case, and their assignments of participating royalties were executed by Walter B. Scoville, their assignor, with the knowledge and consent of the operator, Treasure Company, and the approval of the Commissioner of Corporations, *before the Vickers litigation was commenced.* After the assignment, they held direct from Treasure Company, and no subsequent litigation between Treasure Company and Scoville to which petitioners were not parties could affect their rights.

The assignments from Scoville to these petitioners were dated October 22, 1938. [See the 3rd and 4th documents of Pet. Ex. 2.] The application for transfer in escrow, to which Treasure Company consented [5th document of said Ex. 2, p. 4 thereof], was filed November 7, 1938 (see stamp on first page of 5th document), and the Commissioner's order consenting to the transfer (6th document), was issued on the same date. The complaint in the *Vickers* case was not filed until June 1, 1939. [R. 136, Finding III.] Furthermore, when the agreement was made by Scoville with these petitioners, and when the assignments pursuant thereto were executed, the event which caused the reduction of Scoville's interest, to wit, the bringing in of the well for less than 200 barrels per day, had not occurred. As hereinabove noted, casing was not

set in the well until after November 10, 1938. (*Scoville v. de Bretteville,* 50 Cal. App. 2d 622 at 626.)

The rights of these petitioners in the two 1% participating royalties owned by them, therefore, do *not* depend upon the *Vickers* case. They depend upon the agreement between Treasure Company and Scoville of April 5, 1938 [Treasure Company's Ex. QQ], the royalty assignment by Treasure Company to Scoville [Ex. 2 of these petitioners, 2nd document], and the royalty assignments from Scoville to these petitioners (3rd and 4th documents), without giving any effect to the Vickers judgment. (Of course these documents are to be interpreted, as the Court did in the *Vickers* case, in the light of the subsequent bringing in of the well for less than 200 barrels per day, but, as far as these petitioners are concerned, the interpretation must be by this Court.)

We submit that the royalty assignments, on their face, which was all the trial court had to go on, are not susceptible of the construction that the royalty percentage assigned is a percentage only of the lessee's interest, but, on the contrary, the apparent meaning is that the assigned percentage relates to, and is a percentage of, all oil, gas, etc., produced from the described premises. The pertinent portion of the assignment to Scoville is as follows:

> "Treasure Company, . . . does hereby sell, assign, set over, transfer and convey to
>
> Walter B. Scoville
>
> Nineteen one percent (19%) participating royalty interests in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises, located in the County of Los Angeles, State of California:

Lots Nine (9), Ten (10) and Eleven (11), Block Thirty-three (33), Tract 9809, as recorded in Book 145, Page 91 *et seq.*, of Maps, records of Los Angeles County.

Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36), Block Thirty-three (33), Tract 9809, as recorded in Book 145, Pages 91 *et seq.*, of Maps, records of Los Angeles County."

These parcels constitute the property covered by the Fletcher and the Burns No. 1 Leases respectively, but there is no reference to the leases in the granting clause of the assignment.

The assignments from Scoville to these petitioners read, in the pertinent portions, as follows:

". . . Walter B. Scoville does hereby sell, assign, set over, transfer and convey to Herschel Bullen and Mary H. Bullen, as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor, one (1) One percent (1%) participating royalty interest in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises, located in the County of Los Angeles, State of California:" (Here follows the same description as in Scoville's assignment.)

The assignment to the Haywards is in the same form.

Under the terms of the agreement of April 5, 1938, [Treasure Company's Ex. QQ], the bringing in of the well for less than 200 barrels per day operated *ipso facto,* to limit the foregoing assignments to Treasure Well No. 8, but, by no stretch of the imagination can the agreement be construed to reduce the percentage of the royalty as thus limited.

Wherefore, these petitioners pray that a rehearing be granted, or for such other relief as the Court may deem just.

Respectfully submitted,

WILLIAMSON, HOGE & CURRY,
By FULTON W. HOGE,
Attorneys for Petitioners, Herschel Bullen, Mary N. Bullen, J. C. Hayward and Mary S. Hayward.

Certificate of Counsel.

I, Fulton W. Hoge, counsel for Petitioners in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and is proper to be filed herein.

FULTON W. HOGE,
Attorney for Petitioner.